

INTRODUCTION

This report on the Office of Professional Conduct (“OPC”) will focus on six areas: (I) staff composition; (II) attorney misconduct case process and procedure; (III) statistics for fiscal year 2009-2010; (IV) progress and goals on cases; (V) the Consumer Assistance Program (“CAP”); and (VI) goals for fiscal year 2010-2011.

I. STAFF COMPOSITION

The staff currently consists of ten (10) full-time employees and one part-time file clerk. These ten (10) full-time employees include Senior Counsel, five Assistant Counsels, two Paralegals, one Legal Secretary/Assistant to Counsel, and one Intake Clerk.

II. ATTORNEY MISCONDUCT CASE PROCESS AND PROCEDURE

A) Rules

The Rules of Lawyer Discipline and Disability (“RLDD”) are in Chapter 14, Article 5, of the Utah Supreme Court Rules of Professional Practice. The RLDD are the authority for the attorney misconduct process and procedure. Rule 14-504 of the RLDD is the overall authority for the OPC and Senior Counsel as head of the OPC.

B) Ethics and Discipline Committee

Pursuant to Rule 14-503 of the RLDD, twenty-six (26) volunteer attorneys and eight (8) volunteer non-attorneys are appointed by the Utah Supreme Court to serve on an administrative body called the Ethics and Discipline Committee (“Committee”). The Committee’s function is to consider attorney discipline cases that are appropriately referred to it under the RLDD.

The Utah Supreme Court appoints a Committee Chair and a Committee Vice-Chair from the 26 attorneys. The Committee Chair is responsible for the oversight of the Committee and the Committee Vice-Chair assists the Committee Chair in this task. The remaining twenty-four (24) attorneys and eight (8) non-attorneys do their main work in subcommittees called Screening Panels. The Utah Supreme Court appoints a Chair and the Committee appoints a Vice-Chair to each Screening Panel.

The majority of Screening Panel work is done by conducting hearings. The Screening Panel work must be presided over by either the Screening Panel Chair or the Screening Panel Vice-Chair, and must have a quorum consisting of two attorneys and one non-attorney.

The OPC has the duty to be the secretary of the Committee and handle the Committee's administrative affairs. These OPC duties include scheduling the hearings of the Committee and sending notices to the participants of these hearings.

C) How the OPC Addresses Information That Comes to Its Attention

Specifically addressing the processing of cases, the pertinent provisions of Rule 14-504(b) of the RLDD state that Senior Counsel and the OPC have the power and duty to:

- (1) Screen all information coming to the attention of the OPC to determine whether it is within the jurisdiction of the OPC in that it relates to misconduct by a lawyer or to the incapacity of a lawyer;
- (2) Investigate all information coming to the attention of the Office which, if true, would be grounds for discipline or transfer to disability status and investigate all facts pertaining to petitions for reinstatement or readmission;
- (3) For each matter not covered in Rule 14-510 [of the RLDD] brought to the attention of the OPC:

- (A) dismiss;
- (B) decline to prosecute;
- (C) refer non-frivolous and substantial informal complaints to the Committee for hearing; or
- (D) petition for transfer to disability status;

(4) Prosecute before the screening panels, the district courts and the Supreme Court all disciplinary cases and proceedings for transfer to or from disability status.

Information comes to the OPC's attention in the form of notarized/verified and non-notarized complaints. Notarized/verified complaints are official informal complaints ("informal complaints") within the meaning of Rule 14-510(a)(2) and, therefore, are processed pursuant to Rule 14-504 and Rule 14-510 of the RLDD. By contrast, non-notarized complaints are not official informal complaints, and are usually submitted to the OPC in the form of a Request for Assistance. They are processed pursuant to Rule 14-504 of the RLDD. For purposes of this report, all non-notarized complaints will hereinafter be referred to as Requests for Assistance. The OPC reviews Requests for Assistance in coordination with CAP.

Additionally, pursuant to Rule 14-504(b)(2) and Rule 14-510(a)(1) of the RLDD, the OPC can start an attorney misconduct investigation or complaint on its own initiative, based upon information that comes to its attention. In these cases, the OPC usually sends the attorney a notice of the OPC complaint with the notarized signature of Senior Counsel. Under Rule 14-510(a)(2), the OPC complaint is not required to be verified and attested to.

1) Central Intake System

The OPC's Central Intake System attorneys are assigned to review all initial information received (Requests for Assistance and informal complaints) to determine

whether the matter should be appropriately closed by a declination to prosecute or a dismissal, or whether the matter should be processed further for referral to a Screening Panel. These decisions are made jointly by the intake attorneys and the other staff attorneys at weekly case status meetings.

As part of this system, at the weekly attorney staff meetings the OPC reviews all Requests for Assistance that it receives that are made to CAP. The OPC determines whether the Request for Assistance is appropriate to be handled through CAP (i.e., minor attorney concerns that most likely do not rise to the level of Rule of Professional Conduct violations). The OPC also determines whether the Request for Assistance should be resubmitted as an informal complaint (i.e., serious attorney concerns or matters involving attorneys who are already under investigation by the OPC on the basis of other informal complaints alleging similar concerns). Within those parameters, when appropriate, Requests for Assistance are sent to CAP and there is OPC case closure. The OPC may also close the case by a determination of declination to prosecute. In appropriate cases, the OPC notifies the Complainant to resubmit their Request for Assistance with notarization and verification.

2) Investigations

All reviews of all informal complaints and the decisions associated with these reviews are also made jointly by the OPC attorneys at weekly staff meetings. The informal complaint is reviewed for jurisdiction, merit and timeliness. Looking at the “four corners” of the informal complaint, if the OPC determines it does not have jurisdiction, if the informal complaint fails to state a claim, if the informal complaint is beyond the statute of limitations, or if the case lacks merit in that the alleged conduct even if true is

not an ethical violation, the case is dismissed. In these types of dismissal cases, there is no need to contact the attorney for information. For administrative purposes, the OPC refers to these dismissals as summary dismissals. Both the Complainant and the attorney receive a dismissal letter, and a copy of the informal complaint is sent to the attorney.

Assuming that the OPC does not dismiss an informal complaint based on jurisdiction, merit or timeliness as described above, the OPC conducts a preliminary investigation. The preliminary investigation is to ascertain whether the informal complaint is sufficiently clear as to the allegations. If it is not, the OPC will seek additional facts from the Complainant.

After the preliminary investigation, if the OPC determines that a response is needed from the attorney to reach an appropriate resolution of the informal complaint in accordance with the RLDD, including the possibility of a Screening Panel hearing, the OPC will serve on the attorney a Notice of Informal Complaint (“NOIC”). The NOIC will have attached a true copy of the signed informal complaint and any additional information that the OPC has received from the Complainant. The NOIC will also identify with particularity the possible violations of the Rules of Professional Conduct raised by the informal complaint as preliminarily determined by the OPC. The attorney has 20 days after service of the NOIC to file with the OPC a written and signed answer setting forth in full an explanation of the facts surrounding the informal complaint, together with all defenses and responses to the claims of possible misconduct.

The OPC sends the Complainant a copy of the attorney’s response to the NOIC and, in most cases, continues its investigation by obtaining a response from the

Complainant to the attorney's response. Further, where necessary and appropriate to ascertain the facts necessary to assess the charges, the OPC will seek additional responses and/or contact witnesses. The OPC always examines all documents submitted by all participants. At any point during the investigation, the OPC is willing to conduct settlement discussions with the attorney. Upon completion of the investigation as outlined above, the OPC determines whether the informal complaint sets forth facts which by their very nature should be brought before a Screening Panel or if good cause otherwise exists to bring the matter before a Screening Panel. These are "non-frivolous" and "substantial" informal complaints within the meaning of RLDD 14-504(b)(3) and are required to be presented to Screening Panels consistent with RLDD 14-510(a)(4).

If upon completion of this investigation the OPC determines that the case is not substantial or is frivolous (i.e., the factual allegations made by the Complainant that can be proven do not constitute a violation of the Rules of Professional Conduct or the evidence is insufficient to establish probable cause that the attorney violated the Rules of Professional Conduct), the OPC dismisses the informal complaint consistent with RLDD 14-510(a)(6). For administrative purposes, the OPC refers to these dismissals as standard dismissals. Additionally, as part of its dismissal authority, consistent with the language in Rule 14-510(a)(6) of the RLDD, the OPC can determine that an informal complaint is barred by the statute of limitations, or is more adequately addressed in another forum, or the OPC can decline to prosecute an informal complaint.

The OPC does not arbitrarily decide to decline to prosecute a case. Occasionally, due to the nature of a case (i.e., the remedy sought by a Complainant;

ongoing proceedings and the possible disruption of those proceedings that a Bar disciplinary case could have; the OPC resources needed to process a case compared to the OPC resources needed if the matters are first addressed elsewhere), it is in everyone's best interests to resolve the disciplinary matter by declining to prosecute the case. Generally, the OPC standards for declining to prosecute cases are as follows:

- The OPC may decline to prosecute cases where there is a question as to the nexus between the allegations and the attorney's practice.
- The OPC may decline to prosecute cases where the attorney has already been disciplined for similar misconduct committed during the same period. In these cases, it is unlikely the misconduct will result in discipline greater than what has already been imposed.
- The OPC may decline to prosecute cases where the attorney has taken immediate action to remedy the alleged misconduct.

It should be noted that if the OPC declines to prosecute a case and a court subsequently makes findings that could be the basis for a finding of misconduct under the Rules of Professional Conduct, the OPC may re-open the case and address the findings.

3) Diversions

Effective November 1, 2007, the Utah Supreme Court promulgated a rule for an alternative to discipline policy. Alternative to Discipline is a diversion from discipline by agreement in attorney discipline cases. Pursuant to Rule 14-533 of the RLDD, if the attorney consents to a Diversion Agreement, either a Screening Panel or the OPC may dismiss cases involving minor violations of the Rules of Professional Conduct. The

specific types of cases that are not appropriate for diversion are: when the attorney is accused of misappropriating client funds; the attorney's behavior will, or is likely to, result in substantial prejudice to a client or other person absent adequate provisions for restitution; the attorney has previously been sanctioned in the immediately preceding three years; the current misconduct is of the same type for which the attorney has previously been sanctioned; the misconduct involved dishonesty, deceit, fraud, or misrepresentation; the misconduct constitutes a substantial threat of irreparable harm to the public; the misconduct is a felony; a misdemeanor that reflects adversely on the respondent's honesty, trustworthiness, or fitness as a lawyer; or, the attorney has engaged in a pattern of similar misconduct.

To be eligible for diversion, the presumptive sanction must not be more severe than a public reprimand or private admonition. Further, all involved must make an assessment of whether or not participation in diversion is likely to improve the attorney's future behavior, whether aggravating or mitigating factors exist, and whether diversion already has been attempted.

The Diversion Committee is a Utah Supreme Court Committee created by Rule 14-533, the Diversion Committee. The Diversion Committee has to review and approve every diversion contract. Possible program areas of diversion are as follows: Fee Arbitration; Mediation; Law Office Management Assistance; Psychological And Behavioral Counseling; Monitoring; Restitution; Continuing Legal Education Programs, including Ethics School; and, any other program or corrective course of action agreed to by the responding attorney necessary to address an attorney's conduct.

The OPC notifies an attorney of the diversion option when a case is received. A Complainant is notified of any proposed decision to refer an attorney to diversion and that Complainant may comment, however a decision to divert is not appealable by a Complainant.

Upon entrance to the diversion contract, the complaint against the attorney is stayed pending completion of diversion. If diversion is successful, the complaint is dismissed, and all information regarding the attorney is kept confidential. Further, successful completion of diversion is a bar to disciplinary prosecution based on the same allegations. However, a material breach of the diversion contract is cause for terminating the agreement and subjects the lawyer to appropriate discipline as if diversion had never been an option.

4) Informal Appeals

Pursuant to Rule 14-510(a)(6) of the RLDD, a Complainant can appeal within fifteen days to the Committee Chair the OPC's dismissal including declinations to prosecute of any informal complaint. When the OPC dismisses an informal complaint after investigation or declines to prosecute an informal complaint, it gives notice to the Complainant of the language in Rule 14-510(a)(6) of the RLDD and allows the Complainant the opportunity to appeal the decision. If the Complainant files an appeal, the Committee Chair conducts a de novo review of the OPC file and either affirms the dismissal or directs the OPC to prepare the informal complaint for a Screening Panel hearing.

5) Screening Panel

If after investigation, the OPC determines that the allegations of the informal

complaint are non-frivolous and substantial, or if the Chair or Vice-Chair of the Committee remands a case after an appeal, the OPC refers the informal complaint to a Screening Panel. The NOIC described in section 2 above is the official notice that is required for the OPC to bring the case before a Screening Panel.

A Screening Panel reviews all the facts developed by the informal complaint, the Respondent's answer, the OPC's investigation and the Screening Panel hearing. After this review, the Screening Panel may make the following determinations:

- Dismissal for lack of merit
- Dismissal with a letter of caution
- Dismissal by diversion
- Recommendation that the attorney be (privately) admonished or publicly reprimanded (if the Screening Panel recommends an admonition or public reprimand, the attorney has thirty (30) days to file an exception to the recommendation with the Chair of the Committee.)
- A finding of probable cause that a Formal Complaint be filed with the District Court.

If the Screening Panel determines that the informal complaint should be filed as a Formal Complaint, Rule 14-511 of the RLDD requires the OPC to prepare the Formal Complaint for the signature of the Chair of the Committee. Often the attorney has more than one informal complaint pending against him/her. If there is more than one informal complaint involved, an informal complaint may be temporarily held in a Screening Panel voted-formal-not-yet-filed category until the other informal complaints pass through the Screening Panel process and can be combined into a single Formal Complaint.

6) **Formal Complaints**

A Formal Complaint can be filed in the county where the alleged misconduct

occurred, or in the county where the attorney resides or practices law or last practiced law. Once a Formal Complaint is filed with the District Court, if no settlement can be reached, the case is prepared for a bench trial. The bench trial is bifurcated, the first portion of which involves the adjudication of misconduct (i.e., Rules of Professional Conduct violations). If the judge does not dismiss the case and finds misconduct, the second stage of the trial is a sanctions hearing. At the end of the sanctions hearing, the judge can order sanctions and remedies that may include, but are not limited to, the following dispositions:

- Admonition
- CLE or Ethics School
- Public Reprimand
- Restitution
- Probation
- Suspension
- Disbarment

7) Formal Appeals

All appeals from District Court orders are directed to the Utah Supreme Court. Only the Respondent attorney or the OPC can appeal from the District Court order. The Utah Supreme Court under its constitutional authority to regulate the practice of law has the discretion to consider appeals of all attorney discipline cases.

8) Monitored Cases

Monitored cases include probation cases, disability cases and trusteeship cases. Probation cases require someone to docket reminder dates, and follow-up to ensure that the attorney meets the probation requirements. Disability cases generally require someone to investigate the extent of the disability, to process the case through District Court, and to monitor the continuing status of the attorney. Trusteeship cases generally require that someone inventory the attorney's files, notify the attorney's clients of the trusteeship, and assist with distribution of client files to the clients. Additionally,

trusteeship cases require someone to inventory unclaimed files, prepare a notice for publication of potential destruction of the files, prepare a request to the District Court to approve destruction of unclaimed files, and ultimately to destroy the files.

When the OPC has to undertake a trusteeship, it takes a significant amount of resources and time. It is preferable to the OPC that an attorney or firm outside of the OPC be appointed to manage trusteeships. However, since in most trusteeship cases there is little or no money for the recoupment of costs and fees, there are not always attorneys or firms that are willing and able to oversee a trusteeship.

9) Interim Suspension and Disability

Pursuant to Rules 14-518, 14-519, and 14-523 of the RLDD, if an attorney poses a substantial threat of irreparable harm to the public and has either committed a violation of the Rules of Professional Conduct or has been convicted of a crime which reflects adversely on the attorney's honesty, trustworthiness, or fitness as an attorney, or is under a disability as defined in the RLDD, the OPC may file a petition for interim suspension or disability. This is an immediate filing in the District Court, and need not go through the Screening Panel process outlined above.

10) Final Dispositions

Until a case reaches a "final" disposition, the OPC considers it an active case. Final dispositions are cases where the result has been determined to be dismissal, dismissal with caution, dismissal on condition, admonition, public reprimand, disbarment, time-specified suspension, trusteeship where OPC is not the trustee, probation, resignation pending discipline, and cases in which no appeal is pending.

III. STATISTICS – Fiscal Year 2009-2010 (July 1, 2009 to June 30, 2010)

A) Case Activity

Active cases reported as of 7/1/09 343^A

1) Cases opened

Informal Complaints.....313
 Requests for Assistance765
 Reinstatements3
 Trusteeship.....2
 Reciprocal Discipline2
 Total 1085

Total cases processed during period:..... 1428

2) Informal Complaints Closed

By Declination to Prosecute (declination).....73
 By Dismissal After Investigation (standard).....65
 By Dismissal After Screening Panel 18
 By Summary Dismissal (summary)80
 Total236

3) Requests for Assistance Closed

By Sending to CAP29
 By Return for Notarization 189
 By Declination to Prosecute556
 Total774

4) Cases Closed With Orders of:

		<u># of attys</u>
Admonition	12	(12)
Resignation With Discipline Pending.....	10	(5)
Suspension	17	(6)
Public Reprimand.....	17	(13)
Disbarment.....	1	(1)
Reinstatement.....	1	(1)
Total	58	(38)

Total case closures during period:..... 1068

Active cases as of 7/1/09 360

(Open cases minus closures for fiscal year 2009-2010)

^A The OPC does an audit at the end of every fiscal year. Based upon the audit performed by the OPC at the end of fiscal year (2009-2010), the number of cases active as of July 1, 2009 is 343, not 342.

5) **During the Fiscal Year 2009-2010, the OPC had open case activity as follows:**

Diversions	1
Informal Abeyances	5
Informal Appeals	59
(3 remands by Committee Chair and all 3 have been heard by Screening Panels. The results of the remands have been two dismissals and one dismissal with caution.)	
Reciprocal Discipline	2
(Representing 2 underlying informal complaints)	
Disability	1
(Representing 1 underlying informal complaint)	
Reinstatements	3
(Representing 3 underlying informal complaints)	
Trusteeships.....	2
(Representing 2 underlying informal complaints)	
Formal cases filed with the District Court	10
(Representing 19 underlying informal complaints)	
Formal Appeals	3
(Representing 5 underlying informal complaints)	

6) **Screening Panel outcomes were as follows:** (# of attys)

Cases voted formal	22	(11)
Cases voted public reprimand.....	16	(11)
(1 case is pending before the Utah Supreme Court on appeal)		
Cases voted admonition.....	7	(6)
Cases dismissed	9	(9)
Cases dismissed on condition.....	1	(1)
Cases dismissed with a caution	8	(7)
Total Screening Panel Case Outcomes.....	63	(45)

7) **Stipulations**

Resignation with Discipline Pending	10	(5)
Disbarment.....	1	(1)

Admonitions	3	(3)
Suspensions.....	4	(3)
Public Reprimands	3	(3)
Disability.....	1	(1)
Total Stipulations	22	(16)

8) Notice of Insufficient Funds

As part of the OPC case activity, Rule 1.15(a) of the Rules of Professional Conduct requires that attorneys maintain their trust accounts in financial institutions that agree to report to the OPC “in the event any instrument in properly payable form is presented against an attorney trust account containing insufficient funds (NSF), irrespective of whether or not the instrument is honored.” Pursuant to this rule the OPC opened 96 NSF cases in fiscal year 2009-2010, and dismissed 79 of them. The usual reasons for dismissals of NSF cases are accounting errors, bank errors, depositing errors, or drawing on the account before a deposit clears.

9) Summary

Of the 1428 cases the OPC processed in fiscal year 2009-2010, 1010 or 70.7% were resolved by dismissals, declinations to prosecute, referral to CAP or return for notarization. Of the 1428 cases, 57 or approximately 4% of the cases resulted in Orders of Discipline. Approximately 36.8% of the Orders of Discipline were by stipulation. Finally, approximately 4.4% of the OPC’s processed cases for the year were heard by Screening Panels.

10) Beginning Fiscal Year 2009-2010

The 360 active cases with which the OPC begins Fiscal Year 2010-2011 are against 251 attorneys. The breakdown of the various stages of the 360 cases is as follows:

Requests for Assistance	95
Informal Complaints	74
Informal Abeyances	13
NOIC Opened	86
Diversions	1
Informal Appeals	2
Screening Panel Voted Formal (not yet filed).....	16
Screening Panel Voted Public Reprimand	8
	<u>(underlying informal complaints)</u>
Formals	19
Combine for Formal Filing.....	18
Disability.....	3
Reinstatement.....	4
Trusteeships.....	17
Reciprocal	1
Formal Appeal.....	3

B) Miscellaneous

1) Ethics Hotline and CLE

Rule 14-504(b)(13) of the RLDD requires that the OPC provide informal guidance to promote ethical conduct by Bar members. In compliance with this rule, the OPC has an Ethics Hotline where the OPC attorneys give Bar members informal guidance by telephone. During fiscal year 2009-2010, the OPC rendered 586 informal ethics opinions by telephone.

Additionally, the OPC attorneys make Continuing Legal Education (“CLE”) ethics presentations. During fiscal year 2009-2010, the OPC’s CLE presentations totaled 42.5 hours. Two of the CLE presentations were at the Ethics School conducted by the OPC. The OPC titles the Ethics School “What You Didn’t Learn in Law School.” Some attorneys are required to be there as a condition of a disciplinary case, but the OPC usually opens it to the entire Bar. At the school, the OPC covers a number of topics, including the lawyer discipline process, engaging and terminating the attorney-client relationship, conflicts of interests, lawyer trust fund accounting and hot topics of ethical issues. The OPC also usually tries to have at least one judge as a guest speaker to talk about civility and professionalism. The Ethics School was held in July and January of the 2009-2010 fiscal year for 6 CLE hours each time.

Finally, with respect to ethical guidance, in the past the OPC has provided written guidance to attorneys through publication of Utah Bar Journal articles on common ethics topics, and in brochures available to Bar members and the public. As the need arises, the OPC anticipates continuing to publish articles on ethics topics.

2) Committees

The OPC participates in committees with respect to attorney conduct. Senior Counsel of the OPC sits as a voting member of the Utah Supreme Court’s Advisory Committee on the Rules of Professional Practice. OPC counsel sits as a non-voting member on the Utah State Bar’s Ethics Advisory Opinion Committee. And, Senior Counsel of the OPC is a voting member of the Utah Supreme Court’s Advisory Committee on Professionalism.

3) Rule Violations and Source of Information

The OPC has collected and categorized other data regarding its cases. Specifically, the data collected provide statistics on the rule violations.

(a) For example, for informal complaints reviewed in fiscal year 2009-2010, in approximate percentages, the cases resulted in violations of the following rules:

<u>Percentage^B</u>	<u>Rule</u>
35.1%	1.15 (Safekeeping Property)
31.6%	1.4 (Communication)
21.1%	1.3 (Diligence)
15.8%	8.1 (Bar Admission and Disciplinary Matters)
15.8%	1.5 (Fees)
14.0%	5.3 (Responsibilities Regarding Nonlawyer Assistants)
14.0%	1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)
12.3%	8.4(c) (Misconduct – Deceit, Fraud, Misrepresentation)
10.5%	8.4(b) (Misconduct – Criminal Act)
10.5%	1.1 (Competence)
8.80%	1.16 (Declining or Terminating Representation)
7.02%	8.4(d) (Misconduct Prejudicial to the Administration of Justice)
7.02%	7.5 (Firm Names and Letterheads)
7.02%	4.2 (Communication with Persons Represented by Counsel)
5.26%	3.3 (Candor Toward the Tribunal)
5.26%	1.8 (Conflict of Interest: Current Clients: Specific Rules)
5.26%	1.6 (Confidentiality of Information)
3.51%	5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)
3.51%	1.14 (Client with Diminished Capacity)
1.75%	5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers)
1.75%	3.2 (Expediting Litigation)
1.75%	1.7 (Conflict of Interest: Current Clients)

The OPC's impression is that violations of Rule 1.1 (Competence) commonly derive from attorneys missing court appearances; that violations of Rule 1.5 (Fees)

^B The percentages of actual rule violations exceed 100% because each order of discipline generally includes multiple Rule of Professional Conduct violations.

commonly arise from attorneys collecting fees without performing meaningful work; that violations of Rule 1.15 (Safekeeping Property) often arise from attorneys failing to promptly provide an accounting of how fees were used; that violations of Rule 1.16 (Declining or Terminating Representation) commonly result from attorneys withholding the client file upon termination of the representation; and violations of Rule 8.1(b) (Bar Admission and Disciplinary Matters) usually are based upon attorneys failing to respond to the OPC's lawful requests for information in the course of disciplinary investigations. Accordingly, the OPC's CLE presentations often focus on helping practitioners avoid these particular problems.

(b) Looking at the source for information received in fiscal year 2009-2010, in approximate percentages the sources were as follows:

<u>Percentage</u>	<u>Source</u>
38.1%	Current Client
18.2%	Non-Lawyer
10.4%	Financial Institution
10.0%	Opposing Party
8.0%	Former Client
4.4%	Family Member of Client or Former Client
3.7%	Opposing Counsel
2.9%	Lawyer – Not Opposing Counsel
1.5%	Law Enforcement/Government Agency
1.5%	Judiciary
.40%	Respondent
.30%	Other Outside Disciplinary Source
<u>.30%</u>	OPC

Total: 100.00%

4) Changes to RLDD

There have been changes to the RLDD, and specifically Rule 14-510 regarding the hearing process. Some of the changes were procedural and others were substantive and all became effective November 1, 2009. A summary of the significant

changes is as follows:

- a) Calendar Notices for Screening Panels increased to thirty (30) days;
- b) Attorneys' written briefs for Screening Panels required to be submitted at least ten (10) days before the hearing and cannot exceed ten (10) pages unless good cause;
- c) Direct cross-examination is prohibited at Screening Panels except with request, and Panel Chair determines if it will materially assist Panel;
- d) OPC responsible for audio quality level of recordation of hearings and assembling complete record as custodian of record. Retention period of record increased to at least one year;
- e) Preponderance of evidence of no misconduct needed for dismissal;
- f) Diversion replaces dismissal upon condition;
- g) Time period for filing exception to Screening Panel recommendation increased to thirty (30) days and must include a memorandum stating grounds for review, relief requested, and basis in law or fact for exception (cannot exceed twenty pages) and the Exceptions Officer may request a response from the OPC;
- h) Attorney may make motion to Exceptions Officer for good cause to request to call complainant for cross-examination if complainant was not subject to direct cross-examination at Screening Panel, and can request transcript of Screening Panel Hearing which at cost of attorney, OPC will provide through a court reporter and an affidavit of chain of custody;

i) “Legally insufficient” is added to the burden of proof standards for an attorney at the Exceptions Hearing, and the Exceptions Hearing must be recorded at a level of audio quality for accurate transcription;

j) At the completion of the Exceptions Hearing or if no Exception has been filed, the Ethics and Discipline Committee Chair issues a formal determination and now can either sustain, dismiss, or modify the Screening Panel’s recommendation of discipline, but may not modify the recommendation to be more severe nor require the filing of a Formal Complaint pursuant to Rule 14-511;

k) Within thirty (30) days after service of a final written determination of the Ethics and Discipline Committee Chair of an admonition or a public reprimand where an exception had been filed, an attorney can appeal by filing a request for review by the Supreme Court for reversal or modification.

i) These reviews are subject to the Utah Rules of Appellate Procedure.

ii) The party requesting a transcription of the record will bear the cost and OPC will provide the transcription through a court reporter and an affidavit of the chain of custody.

iii) The Supreme Court will conduct review on record and attorney has burden to show that the determination of Ethics and Discipline Committee was not supported by substantial evidence, was an abuse of discretion, was arbitrary or capricious or was contrary to RLDD or the Standards for Imposing Lawyer Sanctions.

5) Board of Bar Commission Review

As part of its review of the Utah State Bar operations and programs, the 2008-09 Utah State Bar Board of Bar Commissioners reviewed the OPC and CAP. A report was issued on October 8, 2009 and made Findings and Recommendations. On November 4, 2009, the OPC submitted a comment and response to the Review.

The Review found that generally the OPC is performing well and is generally positively regarded by the Bar members. The OPC overall comment on the performance review is that it was performed in a professional and thorough manner. In this respect, the information gathered was from sources at multiple levels and aspects of the attorney discipline process. The OPC welcomed and appreciated the opportunity to be a source of the information gathered. The OPC, in conjunction with CAP, is working to ensure that the recommendations are implemented.

IV. PROGRESS AND GOALS ON CASES

The OPC, like every other state bar disciplinary authority, has and will continue to have unfinished work. Furthermore, the OPC, like every other state bar disciplinary authority, has and will continue to have a percentage of its unfinished work accumulate at the informal stage. The reason for this is the nature of the work. In this regard, the OPC processes disciplinary cases against attorneys who are often determined to use every means at their disposal to protect their "privilege" to practice law. This sometimes makes investigating and processing cases analogous to a criminal proceeding. In these cases, it tends to lengthen the processing at both the informal and post-informal stages. Notwithstanding the nature or the work, it should be noted that the OPC's overriding mission is to perform its responsibility in a professional and civil manner.

The OPC case progress goal is to have a system in place that keeps cases moving so the unfinished work at the informal stage is in percentage numbers as small as possible. This goal must be accomplished while simultaneously, and as expeditiously as possible, moving the larger percentage of cases that are at the post-informal stage (i.e., cases before Screening Panels or the District Court; cases on appeal; cases holding for resolution of a companion formal case; or cases held in abeyance pending related litigation).

As progress points of comparison of this fiscal year with last fiscal year:

- (1) Cases received this fiscal year were down approximately 7% (1085 vs. 1172);
- (2) Dismissals this fiscal year decreased by approximately 9% (1010 vs. 1112);
- (3) Cases closed with orders of discipline this fiscal year increased by approximately 15.8% (57 vs. 48); and
- (4) Active case number at the end of the last fiscal year increased by approximately 4.7% (360 vs. 343).

The OPC has a goal to reduce its active case number each fiscal year by closing more cases in a fiscal year than the office receives in that year. This year, the OPC was very close to this goal because it received 1085 cases and closed 1068 cases and its active case number only increased by about 4.7%.

The OPC has also established a goal of attempting to have 25% or less of its cases be in the informal stage for a period of no more than six months. Of its current caseload, 295 of these cases are at the informal stage. And of the 295 cases, 51 or approximately 17.3% of these cases have been in the informal stage for over six

months. It should be noted that 19 of the 51 cases are either abeyances, informal appeals or special prosecutor cases (special prosecutor cases are cases filed against either OPC staff, Bar Commissioners or Ethics and Discipline Committee lawyer members – which pursuant to Rule 14-517(f) of the RLDD, have to be prosecuted outside of the OPC). Not counting these 19 cases, about 10.8% of the 295 cases have been at the informal stage for a period of greater than six months. This 10.8% number is well below the OPC's goal and the OPC will strive in the upcoming fiscal year achieve its percentage goal.

Finally, the OPC has the goal of bringing the majority of all its cases to final resolution in a current fiscal year. In this fiscal year, the OPC brought approximately 74.8% of the cases it processed to a final disposition; this included bringing informal and post-informal stage cases to final dispositions. Based upon this fact, the OPC accomplished this goal. It should also be noted that while accomplishing this goal, the OPC also filed a significant number of new formal cases. In this respect, in addition to handling 7 new cases of reinstatement/trusteeships/reciprocal, the OPC filed 10 new formal cases with the District Court (the 10 formal cases represent 19 underlying informal complaints).

The OPC does not simply concentrate its efforts on older cases: it attempts to provide expedited and efficient work on all cases, new and old. This work method is intended to keep cases progressing.

The Central Intake System greatly aids case processing goals. Central Intake enables the OPC to address all information coming to its attention (both notarized and non-notarized) and to quickly and efficiently determine the appropriate track for the

information. This leaves more resources to address cases raising more serious ethical allegations, resulting in quicker case processing for all cases.

V. CONSUMER ASSISTANCE PROGRAM

The CAP is not part of the OPC, but the OPC works in coordination with it, and reviews information sent to the Utah State Bar as a non-notarized Request for Assistance. This review ensures that allegations of serious misconduct are not processed as Requests for Assistance. Of the 765 Requests for Assistance the OPC received in fiscal year 2009-2010, 29 were sent to CAP, and only 5 ultimately came back to the OPC in this fiscal year as informal complaints. Thus, with respect to fiscal year 2009-2010, 24 cases were resolved by CAP.^c The OPC uses the resources normally needed for reviewing and resolving the cases that are handled by CAP to process cases where there are serious ethical violations.

VI. GOALS FOR FISCAL YEAR 2010-2011

It should be noted that the goals of OPC may be affected by changes to the Rules of Lawyer Discipline and Disability effective November 1, 2009. More specifically, as outlined in this report, among the rule changes is a direct right of appeal to the Utah Supreme Court from Exception Hearings of the Ethics and Discipline Committee in cases involving discipline of admonitions and public reprimands. This change has the potential to necessitate an increased use of OPC resources in defending these appellate actions. This rule change may also increase the number of Exceptions filed as appeals from Screening Panel recommendations of admonitions and public reprimands. The OPC will monitor these numbers.

^c Since CAP is not part of the OPC, the OPC does not have complete statistics on cases resolved by CAP in a fiscal year.

The OPC will continue to work toward the goals outlined in this report. Specifically, the OPC has a responsibility to resolve disciplinary complaints in a uniform; expeditious; professional; civil and systematic way to protect the public, clients, and the legal profession from the professional misconduct of attorneys. The overriding goal is to continue to develop the OPC case processing system to ensure that the majority of resources are utilized to more quickly prosecute those cases where it is appropriate to file formal complaints with the District Court.

CONCLUSION

The OPC staff is excellent and continues its hard work. The OPC will continue its efforts towards efficiency in the expedition of cases. The OPC looks forward to another productive year.

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